Supreme Court, U.S.
FILED

96 59 APR 2 2 1996

OFFICE OF THE CLERK

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

C. Drake Cazier,
Petitioner,

V.

NATIONSBANC MORTGAGE CORPORATION
f/k/a KEYCORP MORTGAGE INC.,
f/k/a GOLDOME REALTY CREDIT CORP.,
Respondent,

On Petition for a Writ of Certiorari To The Supreme Court Of The State of Idaho

PETITION FOR A WRIT OF CERTIORARI

C. DRAKE CAZIER
WEST 3025 SUMMER ROAD
ATHOL, IDAHO 83801
(208) 772-4333
Petitioner, Pro Se

89 pp

QUESTIONS PRESENTED FOR REVIEW

I.

Does the subdivision of a section of land which was originally surveyed as public land under title 43 control the interpretation of a description and/or establishment of a boundary?

II.

Is the establishment of a boundary of real property on the ground a question of law or a question of fact?

LIST OF PARTIES TO THE PROCEEDINGS BELOW

NATIONSBANC MORTGAGE CORPORATION
f/k/a KEYCORP MORTGAGE INC.,
f/k/a GOLDOME REALTY CREDIT CORP.,
C. DRAKE CAZIER
LYN CAZIER
SHANTA HOMES, INC.,
MCINTOSH MANAGEMENT, INC.

,Shanta Homes, Inc. and McIntosh Management, Inc. are wholly owned by C. Drake Cazier and Lyn Cazier

TABLE OF CONTENTS

Questions Presented for Review.....i

List of Parties.....ii

Table of Contents.....iii

Table of Authorities.....iv

Jurisdiction.....1

Statement of Case.....3

Prior Proceedings.....7

Issue Rasied in Previous Proceeding and Argument.....10

Conclusion.....22

Appendix

Memorandum Opinion and Order in Re:Summary Judgement.....1

Memorandum Opinion and Order Re:Motion to Reconsider.....25

Judgement.....36

Opinon of Court of Appeals of the State of Idaho.....43

Order Denying Petetion For Review.....59

Corner Perpetuation and Filing Record...60

Moore Second Plat.....61

TABLE OF AUTHORITIES

Act of May 18, 1796 (1 Stat. 464).....1

Act May 10, 1800 (2 Stat. 73).....1

Act Feb. 11, 1805 (2 Stat. 313).....1

Act April 25, 1812 (2 Stat. 716).....1

Act April 24, 1820 (3 Stat. 566).....1

Act May 29, 1830 (4 Stat. 417; R.S. secs. 2412, 2413).....1

Act April 5, 1832 (4 Stat. 503).....1

Act July 4, 1836 (5 Stat. 107).....1

Act March 3, 1849 (9 Stat. 395).....1

Act March 3, 1925 (43 Stat. 1144).....1

Bailey v. Chamblin 20 Ind 33.....4, 18

Gardner v Bonestell 180 US 362.....4

Marvil v. Ginther 140 A. 95.....3

Morley v Murphy 179 Iowa 853.....4

Pacheco v. Martinez 636 P2d 308.....3

Peet v Joslin 190 NW 938.....4

Tolleston Club of Chicago v State 141 Ind 197.....4

USCS 43 § 752-753.....2

Vaughn v McClymond 116 Mont 542.....4

JURISDICTION

The Supreme Court of the United States has jurisdiction in this case by the following;

The judgement entered by The District Court of the First Judicial District of the State of Idaho, in and for Kootenai County Honorable Gary M. Haman, District Judge Presiding on January 26, 1994 and the Memorandum Opinion and Order in Re: Motion to Reconsider dated June 14, 1994 and Judgement dated July 11, 1994 are in conflict with federal law for the subdivision of a section of land.

This case involving title and establishment of boundary concerns a parcel of land originally surveyed as public land. The earliest laws in the United States regarding the rectangular system of surveying were passed by the Continental Congress on the 7th of May, 1784. Subsequently, the Acts of May 18, 1796 (1 Stat. 464); May 10, 1800 (2 Stat. 73); Feb. 11, 1805 (2 Stat. 313); April 25, 1812 (2 Stat. 716); April 24, 1820 (3 Stat. 566); May 29, 1830 (4 Stat. 417; R.S. secs. 2412, 2413); April 5, 1832 (4 Stat. 503); July 4, 1836 (5 Stat. 107); March 3, 1849 (9 Stat. 395); March 3, 1925 (43 Stat. 1144) were enacted. These laws regulate the method whereby these lands were to be surveyed.

Specifically title 43 USCS § 752-753 mandate the subdivisions of sections;
§ 753. Lines of division of half quarter-sections; how run

In every case of the division of a quarter-section the line for the division thereof shall run north and south, and the corners and contents of half quarter-sections which may thereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by the section preceding [43 § 752], and fractional sections containing one hundred and sixty acres or upwards shall in like manner as nearly as practicable be subdivided into half quarter-sections, under such rules and regulations as may be prescribed by the Secretary of the Interior, and in every case of a division of a quarter-section, the line for the division thereof shall run east and west, and the corners and contents of quarter quarter-sections, which may thereafter be sold, shall be ascertained as nearly as may be, in the manner, and on the principles, directed and prescribed by the section preceding [43 § 752]; and fractional sections containing fewer or more than one hundred and sixty acres shall in like manner, as nearly as may be practicable, be subdivided into quarter quarter-sections,

under such rules and regulations as may be prescribed by the Secretary of the Interior. (R.S 2397).

Finally these "regulations as may be prescribed by the Secretary" are; The US Manual of Survey Instructions and The Circular on Restoration of Lost or Obliterated Corners and the Subdivisions of Sections.

Second, the decision of the state court while attempting to reconcile an ambiguous deed established a boundary on the ground as a matter of law. The Supreme Courts of other states has found that the "interpretation of a deed is a matter of law and the establishment of a boundary is a matter of fact." Pacheco v. Martinez 636 P2d 308 (1981); Marvil v. Ginther 140 A. 95 (1928). Thus falling within the scope of Title 28 Appendix Rule 10.1 (b).

Juristiction in this case should be allowed under Rule 10.1 (b) this case was appealed to the Idaho Supreme Court and was heard by the Appellate Court who confirmed the District court decision. Petition for review to the Supreme Court of Idaho was denied.

STATEMENT OF THE CASE

As stated above the land in questions was originally public land and it's boundaries and corners controlling it's subdivision

were surveyed pursuant to federal law. It was not intended that these corners or boundaries would be abandoned after patenting into private hands but to the contrary that they remain fixed and unchangeable. (Tolleston Club of Chicago v State 141 Ind 197; Bailey v. Chamblin 20 Ind 33; Gardner v Bonestell 180 US 362; Vaughn v McClymond 116 Mont 542; Morley v Murphy 179 Iowa 853; Peet v Joslin 190 NW 938.

The case at bar was an action for unlawful detainer that later was converted to a quiet of title, ejectment and trespass of a certain piece of property described as:

A PARCEL OF LAND IN THE WEST HALF OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 22, TOWNSHIP 53 NORTH, RANGE 4 WEST, BOISE MERIDIAN, KOOTENAI COUNTY, IDAHO, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT THE NORTHWEST CORNER OF SECTION 22; THENCE,
SOUTH 0°06'57" EAST ALONG THE WEST BOUNDARY OF SECTION 22, 1336.51 FEET TO THE NORTHWEST CORNER OF LOT 1, BLOCK 3 OF HOLIDAY RANCH ESTATES; THENCE, NORTH 89°06'29" EAST ALONG THE NORTH BOUNDARY OF LOT 1, BLOCK 3, 518.40 FEET TO THE TRUE POINT OF BEGINNING; THENCE, NORTH 22°44'30" WEST, 258.54 FEET; THENCE,
NORTH 89°06'29" EAST, 240.00 FEET; THENCE,
SOUTH 0°00'36' WEST, 210.00 FEET; THENCE,
SOUTH 89°06'29" WEST, 30 FEET; THENCE,
SOUTH 0° 00'34" WEST, 30 FEET; THENCE,
SOUTH 89°06'29" WEST, 110.00 FEET TO THE TRUE POINT OF BEGINNING.

It is the first part of the description that specifies the subdivision of the section which raises the federal question.

The record and testimony are clear and undisputed that the correct monument of the Northwest corner of section 22 which controls the section lines and subdivision of the section were established by John B. David for the United States Government Land Office in November, 1880 and that the North West corner was remonumented by Gale Dahlman surveyor for the state of Idaho in 1977. Attached as appendage A was a certified copy of the Corner Perpetuation and Filing Record for the North West corner of section 22 this was originally place in the record at (R. Vol 1, p. 70-71).

On August 31, 1981 a contract of sale was entered into by the Yarboroughs, as buyers, and Toomeys as sellers. The legal description was for the West 1/2 of the Northwest 1/4 of the Northwest 1/4 of section 22 Township 53 North range 4 West Boise Meridian, Kootenai County Idaho (Plaintiff's exhibit 1). A provision in that contract allowed for a partial release of one acre in this parent parcel upon the payment of $2,000. This payment was made. Whereupon a warranty deed, including the above metes and bounds legal description,

was drafted by persons unknown (Plaintiff s exhibit 2). Again no survey was done, although Yarborough testified that he had hired a surveyor to do this work, he also testified that he did not know the name of the surveyor nor did he see any stakes on the ground nor a survey plat (Tr. Vol. 1, p. 69-70).

In September of 1987 C. Drake Cazier, acting for Shanta Homes, Inc., purchased from Yarborough the entire parcel with the legal descriptions of the West 1/2 of the Northwest 1/4 of the Northwest 1/4 of section 22, less the above disputed description and a second deed for that description.

A dispute arose over the mortgage payment and a foreclosure sale was held. In July 1991, nearly a year after the foreclosure, Patrick Moore at the request of Harry Richardson, attorney for KeyCorp attempted to survey the legal description. Mr. Moore developed a survey plat and filed it August 14, 1991 and it was recorded at book 10 Page 80 of the Kootenai County Recorders Office (Plaintiff's exhibit 23). (It appears as the last page of the Judgement issued by the State District Court Dated July 6, 1994 in the Appendix.

After creating his initial plat Mr. Moore developed a second plat which shows

that there is a gap of land over 14 feet wide between the North boundary of Lot 1 block 3 of Holiday Ranch Estates and another gap of over 30 feet in width between the West boundary of Lot 3 Block 3 of Holiday Ranch Estates and the boundary of the West 1/2 of the Northwest 1/4 of the Northwest 1/4 of section 22. These gaps which Mr. Moore ignored on his original plat, contain the "true point of beginning" Mr. Moore used to establish his starting point on his first plat. The area involves nearly 25% of the land that he shows as being contained with in the description, and yet even he labels this area as "area of questionable ownership" (Plaintiff's exhibit 24). (This appears as Appendage B.

PRIOR PROCEEDINGS

On December 24, 1990 a complaint was filed by Goldome Realty Credit Corp., predecessor to Keycorp, predecessor to NationsBanc, alleging unlawful detainer.

An answer to the complaint was filed on February 11, 1991.

Plaintiff filed for Summary Judgement and a hearing was held on October 15, 1991.

A decision was issued by the magistrate on December 30, 1991 in favor of the defendants. That decision in part states that;

"a factual issue concerning the property description appears to remain as a material dispute. ... There is a dispute as to the proper method of conducting this survey which is clearly material in this case. Plaintiff's expert's affidavit may appear more persuasive in comparison to C. Drake Crazier's(sic) opinion but the Defendant has provided some foundation of surveying knowledge and must be accorded favorable inference." (Tr. Vol. 1 p. 77-78)

On March 4th 1993 a motion to dismiss and a Memorandum in Support of Motion to dismiss with affidavits were filed by Defendants. This motion was denied.

Trial was held at Magistrate level and Plaintiff presented it's entire case and witnesses. On May 13, 1993 at the conclusion of the plaintiff's case, defendants again moved for dismissal.

The Magistrate concluded that the case of unlawful detainer would be dismissed. The case was amended and transferred after dismissal.

On June 4, 1993 an amended complaint was filed in District Court by the plaintiff for quiet of title, ejectment and trespass. An answer and demand for jury trial was filed on July 29, 1993. On

October 25, 1993 plaintiff moved for Summary Judgement along with supporting memorandum.

Defendant filed a memorandum in opposition with supporting affidavits.
A hearing was held and a Memorandum Opinion and Order was entered on January 26, 1994 in favor of the plaintiff, concluding in part that;

> "The evidence which is in the record further supports the conclusion that the house is upon the real property as it is described. See Record of Survey by Patrick J. Moore in July 1991. Thus, the plaintiff's Motion for Summary Judgement shall be granted as to the actions for ejectment and quiet title. With regard to the action for quiet title, the boundary of the real property is as set forth in the Record of Survey by Patrick J. Moore in July, 1991." (Tr. Vol 2, p. 275).

A Motion of Redetermination was filed by the Defendants on February 2, 1994 and was supported by affidavits. In addition a motion for summary judgement to dismiss was filed by defendants.

The court ordered an indefinite continuance of the hearing on Defendants' motion for summary dismissal and entered a Memorandum Opinion and Order in Re: Motion

to Reconsider, in favor of the Plaintiff stating in part that "This lawsuit is not about the survey itself or other technicalities."

Whereupon Defendants filed their appeals to the Idaho Supreme Court. The case was assigned to the Idaho court of appeals.

An appellant brief was filed by C. Drake Cazier Pro Se containing thirteen issues on appeal. Another brief was filed by David Frazier, an Idaho attorney for and in behalf of Lyn Cazier and the Corporate Defendants incorporating the Cazier brief and raising one more issue on appeal.

A single brief was filed for respondent.

C. Drake Cazier filed a reply brief and the appeal proceeded through oral arguments. An opinion issued on November 27, 1995 affirming the district court decision.

A petition for review was filed with the Idaho Supreme Court on December 18, 1995.

The petition was denied January 23, 1996.

ISSUE RAISED IN PREVIOUS PROCEEDINGS

In demonstrating that petitioner has raised these issues of federal law it is helpful to note that Idaho code 31-2709 states that;

> "No surveys or resurveys hereafter made shall be considered legal evidence in any court within the state, except such surveys as are made in accordance with the United States manual of surveying instruction, the circular on restoration of lost or obliterated corners and subdivisions of sections, issued by the general land office, or by the authority of the United States, the state of Idaho, or by mutual consent of the parties."

The US Manual of Survey Instructions and The Circular on Restoration of Lost or Obliterated Corners and the Subdivisions of Sections, referred to in the Idaho code are the same as have been and are required to survey the public lands of the United States as required by federal law.

Therefore each time Defendants raised the objection to surveys not being in compliance with these publications and specifically with the proper subdivision of the section it can be fairly understood to be an objection based on federal law.

Through out the proceedings of this case the Defendants have raised the issue that the surveys presented by the Plaintiff do not comply with these instructions and federal law. Rather than being redundant petitioner has incorporated the citations

to the record as part of the argument here, thus pointing out both that the issue was raised and presenting it here.

In their first objection to the motion for summary judgment at the magistrate court Defendants provided the affidavit of Mr. Sanders, the surveyor of Holiday Ranch Estates where he states:

> "That all points for the survey of Holiday Acres Subdivision originated at the corner set by private survey performed by Mr. Ellersick and not the section corner set by the State of Idaho." (R. Vol 1, p. 52 @4.)

With Defendant's motion to dismiss at the magistrate level Defendants provided the first affidavit of Dell Cazier. This affidavit disputes the Moore survey which is the basis of the lower courts decision. Dell Cazier says @ R. Vol. 1 page 90-101 that Moore did not show the section corners or section lines (statement numbers 3, 4 & 5). That there is a gap between the boundary of the W1/2 of the NW1/4 of the NW1/4 of the section and the boundary of the Holiday Ranch Estates. (@7) That the basis of bearing of the Moore Survey is incorrect. (@8 & 9) That even if the call to the section line and corner were ignored and the survey was started at the corner of the Holiday Ranch Estates "conflicts and

discrepancies would still have had to be shown." and that a survey can not "begin at some point in the description deemed convenient and selected by the surveyor to suit a pre-conceived idea." and finally that Idaho code Chapter 13, Section 50-1304, Essentials of Plats, that a plat shall show 'initial point and tie to at least two (2) public land survey corners...'".(@12)

Further at the trial at magistrate level there is over 24 pages of cross examination of Mr. Moore on his compliance with the US Manual (Tr. Vol. 1 page 91-105 and page 115-125). That is when Mr. Moore admits that his survey is not done in compliance with the US Manual. Mr. Moore states repeatedly that it is his opinion that Idaho code 31-2709 and the US Manual only applies to;

> "...surveys of the public lands. It's not addressing itself specifically to lands that have been patented into private ownership." (Tr. Vol.1, p. 98, L. 25- p. 99, L. 2; p. 103, L. 15-16; p. 114, L. 11-17; p. 120, L. 22-24; p. 122, L. 8).

When Plaintiff moved to have the Moore Survey admitted into evidence Defendants objected citing Idaho code 31-2709. (Vol. 1, p. 115, L. 6- p.124, L.25).

Eventually, the court ruled however that:

> "I don't think this statute is prohibitive of surveys simply because they are not done in conformity with the manual that we've discussed here."(Tr. Vol. 1, p. 124, L. 23).

Similarly Defendants objected to the introduction of the plat of the Holiday Ranch Subdivision on the same grounds. (Tr. Vol 1, p. 91, L. 2-15). Mr. Geddes asked Mr. Moore specifically about the Holiday Ranch Estate Survey:

> Q: "Okay. and, my question is, do you know if this survey was made in accordance with the United States manual of survey instructions?
>
> A. I'm not sure I can answer that. I believe that well, I can't even speak to the intent of the of the --- of the surveyor that actually surveyed this." (Tr. Vol. 1, p.91, L. 19-21).

Clearly Mr. Moore could not authoritatively answer that the survey had been conducted in accordance with the manual and stated so. Even if Mr. Moore had stated the Holiday Ranch Estates plat had been surveyed according to the manual, Mr. Sanders the surveyor of the plat, had already stated through affidavit that he did not use the corner remonumented by the State of Idaho which is required by the US

manual of instructions at 5-1 in the 1973 manual or section 348 in the 1947 manual for the identification of an existent corner of the North West Corner of Section 22.

Accompanying Defendant's motion of redetermination in the State District court were filed the affidavits of Bruce Anderson the Surveyor for Kootenai County, Idaho and two affidavits of Walter Robillard. The Plaintiff, Plaintiff's expert witness Mr. Moore and the District Court had all referenced Mr. Robillard's books. Both Mr. Robillard and Mr. Anderson indicate the errors of the Moore survey.

Regarding the subdivision of the section Mr. Anderson says;

> "It is apparent to the affiant that Mr. Moore did not subdivide section 22 into the necessary aliquot parts per instructions at 3-87 in 1973 manual to determine the boundaries of the West 1/2 of North West Quarter of the North West Quarter of section 22 wherein the subject property was to be located. It appears from his record of survey that it is based upon some found rebars, purportedly tied to the Northwest Corner of Section 22, that does not agree with the original General Land Office notes. ... it is my opinion

that the West 1/2 of the Northwest Quarter of the Northwest Quarter of Section 22 has not been established as originally surveyed." (R. Vol 2, p. 280; R. Vol 2, p. 309).

Additionally Mr. Robillard states that:

"I make this affidavit because my reference texts are referenced to by the Plaintiff and some of the statements are taken out of context and are not true and correct interpretations. .... I also will provide certain comments about statements and comments that, based on my 43 years of surveying and locating descriptions, and working on boundary problems, plus teaching at university and state level, are, in my opinion mis-interpreted and mis-applied."(R. Vol 2, p. 282 @ 9.)

Both of these affiant conclude the same; Mr. Moore's survey should be considered invalid and null and void, abinito and as such pursuant to Idaho code it can not be relied on by the court or anyone else. (R. Vol 2, p. 280; R. Vol 2, p. 310).

Finally the most damning and conclusive evidence of the errors in the Moore survey comes from Mr. Moore himself.

First, his own statements are that he need not and did not follow the US Manuals. Additional his second plat that was enter into evidence at the magistrate level of the Idaho district court as exhibit #24 (Appendage B here) shows the conflict of the boundary he establish and the boundaries of the W1/2 of the NW1/4 of the NW1/4.

In Defendant's brief to the Idaho Supreme Court the issue of the proper subdivision of the section was raised as the main issue. Three of the issues on appeal were:

2. Did the trial court err in it's findings based on surveys which do not comply with the requirements of the law of Idaho?

9. Did the trial court err in not recognizing the difference between construction of a deed and establishment of a boundary?

12. Did the trial court err in determining a private land survey was correct as a matter of law?

The appellant brief which was limited to 50 pages discussed the improper method of surveying and the US Manuals from page 17-27. The more poignant parts are cited here:

As previously discussed and shown in the plat proper subdivision would also shorten the North and West boundary and a written description of what is left would be entirely different than that contained in the deeds. Even more important proper subdivision would eliminate what Moore used as his true point of beginning. This uncertainty as to the true point of beginning causes the description to become floating. Mr. Monaco's statement makes it clear that if the correct monuments are used to subdivide the section as required by law (Bailey v. Chamblin 20 Ind 33.) the Moore survey which the trial court ruled was the boundary of the property can not be so located. (Appellant's brief page 25 lines 9-27)

EVIDENCE OF THE SURVEYS UPON WHICH THE TRIAL COURT RELIED FOR IT'S DECISION SHOULD NOT HAVE BEEN ADMITTED AND DO NOT CONSTITUTE SUCH A SHOWING AS WOULD SATISFY THE PLAINTIFF'S BURDEN OF PROOF SINCE THE SURVEYORS DID NOT USE THE CORRECT MONUMENTS OF THE SECTION TO SUBDIVIDE THE SECTION IN ITS ALIQUOT PARTS, NECESSARY TO ESTABLISH BOUNDARIES OF THE WEST HALF OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 22.

The legal description states that this is "a parcel of land in the West half of the

Northwest quarter of the Northwest quarter of section 22". It is necessary that the parcel be contained within that subdivision of the section for two reasons: First, that is what is stated in the legal description. Secondly, as previously discussed this subdivision of the section is the only land that Mr. Yarborough purchased or could have purchased from Mr. Toomey, because Mr. Toomey had already sold all remaining parts of the West half of section 22 to the partners of Holiday Ranch Estates. (Legal description on plat of Holiday Ranch Estates Plaintiff's exhibit 22).

It is clear from the previous argument and references that neither plat used the correct corners so it naturally follows that the subdivision of the section, which is based on the corners must also be in error. (Bailey v. Chamblin 20 Ind 33.) This is verified in the affidavits of all three of the Defendants' expert witnesses (R. Vol. 2, p. 280 @4; R. Vol. 2 p. 309 @8; R. Vol. 1 p. 95). (Appellant's brief page 26 lines 1-47)

EVIDENCE OF THE SURVEY UPON WHICH THE TRIAL COURT RELIED FOR IT'S DECISION SHOULD NOT HAVE BEEN ADMITTED AND DOES NOT CONSTITUTE SUCH A SHOWING AS WOULD SATISFY THE PLAINTIFF'S BURDEN OF PROOF SINCE SURVEY WAS NOT TIED TO ANY GOVERNMENT

CORNERS.

One of the glaring errors of the Moore Survey is that it is not complete and is not tied to any government surveys. This tie is essential to establish it's position in relation to the rectangular method of surveying used to survey the entire state of Idaho. In order to assure that all surveys use the rectangular method, the Idaho Legislature adopted Section 50-1304. Without these ties to the government corners the survey is left floating. Not only was Mr. Moore required to show these ties by Idaho Code but it is also required by the US manual of Survey Instructions at 7-16 in the 1973 manual or section 472 in the 1947 manual. This Mr. Moore clearly did not do as attested to by Mr. Anderson, Mr. Dell Cazier, and Mr. Robillard (R. Vol. 2, p. 280, @5; R. Vol. 2, p. 310, @9; R. Vol. 1, p. 91, @12).

The Moore survey should not have been admitted because of violation of both the US Manual and this additional Idaho statute.

In conclusion of this section of argument it is important to note that Mr. Moore states repeatedly that it is his opinion that the Idaho statute and US Manual only applies to;

"...surveys of the public lands. It's

not addressing itself specifically to lands that have been patented into private ownership." (Tr. Vol.1, p. 98, L. 25- p. 99, L. 2; p. 103, L. 15-16; p. 114, L. 11-17; p. 120, L. 22-24; p. 122, L. 8). As previously cited Mr. Moore is entirely wrong. (Appellant's Brief page 28 line 1- page 29 line 21)"

In the Appellant's Brief in support of their petition for review the same specific objection to the improper subdivision of the section was raised with reliance on the US Manuals.

The lower courts in trying to resolve the ambiguities of the deed focused only on the issue of the line from the section corner to the North West corner of lot 1 Block 3 of the Holiday Ranch Estates. They did not address the other remaining ambiguities.

These ambiguities are clearly shown in Mr. Moore's second plat (exhibit 24) which was cited in Defendants opposition to summary judgement (R. Vol 1, p. 236-237). This plat shows that proper subdivision of the section leaves a gap of land over 14 feet wide between the North boundary of Lot 1 block 3 of Holiday Ranch estates and another gap of over 30 feet in width between the West boundary of Lot 3 Block 1

of Holiday Ranch Estates and the boundary of the West 1/2 of the Northwest 1/4 of the Northwest 1/4 of section 22. This subdivision of the section is not "adjoining Holiday Ranch Estates" as stated in the appellate opinion page 6 last line. This is attested to in Dell- Cazier's affidavit (R. Vol 1, p. 91 @4.)

There are several problems with ignoring proper subdivision of the section. First, both Plaintiff and Defendants have deeds with description for land only in the W1/2 of the NW1/4 of the NW1/4 of the section. Therefore any land conveyed or title quieted, must be in that subdivision of the section.

Also these gaps which Mr. Moore ignored on his original plat exhibit 23, which is the finding of the court, contains the "true point of beginning". (Petition for Review to the Idaho Supreme Court, Page 15 line 2 - page 16 line 2)

CONCLUSION

The legal and practical importance of this is that neither the First Moore survey nor the Holiday Ranch Estate survey recognized or used the proper corners or subdivision of the section established by John B. David for the United States Government Land Office in November, 1880.

Thus only by ignoring this federally

mandated subdivision could the legal description be interpreted and a boundary for the property established. This boundary however would extend outside the boundary of the W1/2 of the NW1/4 of the NW1/4 and conveys property that the grantor did not own.

On the other hand recognition of the legally established subdivision of the section preclude such establishment and thus render the description and deed void.

This is what none of the lower courts have recognized and what the opposing party has avoided. That the proper subdivision of the section by the federal government by and through it's constitutionally established Government land office and subsequent entities are binding on all subsequent surveys and land descriptions.

Therefore petitioner pleads this court to review this case and determine that the federal law which established the section lines and subdivisions, supercede private surveys and continue to control surveys and description of land even after patenting into private hands.

Respectfully Submitted

C. Drake Cazier, Pro Se

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

KEYCORP MORTGAGE INC., f/k/a GOLDOME REALTY CREDIT CORP.,
Plaintiff,
vs.
C. DRAKE CAZIER and LYN CAZIER, husband and wife, SHANTA HOMES, INC., JOHN DOES I THROUGH IX, MCINTOSH MANAGEMENT, INC., JOHN DOES X THROUGH XIX,
Defendants.

(filed January 26, 1994)

In its First Amended Complaint, KeyCorp alleges causes of action for (1) Ejectment, (2) Common Law Trespass, and (3) Quiet Title. KeyCorp has moved for Summary Judgment. Motion granted in part.

Larry E. Prince and Robert A. Faucher, HOLLAND & HART, Attorneys for Plaintiff.

C. Drake Cazier, Pro Se.

FACTUAL AND PROCEDURAL BACKGROUND

In order to better understand how the

dispute in this case arose, it is necessary to go back in time. On August 31, 1981, as the owner of both parcels, he had not separated the two. The one acre parcel was an unusual shape because it had to adjoin the road and include the house.

Sometime after the purchase of the property from the Toomys, the Yarboroughs were divorced. In 1986, the property was refinanced and James E. Yarborough executed a Deed of Trust for the benefit of Family Home Mortgage. The description in that Deed of Trust is the same as the description in the other deeds.

In September of 1987, the property was sold by Yarborough to Shanta Homes, Inc. At the time of the sale, the property was listed as two separate parcels, However, both parcels were sold together because the house is in a development that requires a minimum of five acres. Shanta Homes assumed the obligation of Yarborough under the Deed of Trust that had been executed a Warranty Deed, which is dated September 10, 1987, to Shanta Homes, Inc. C. Drake Cazier, as the principal behind Shanta Homes, negotiated the sale, The legal description in the Warranty Deed from James E. Yarborough to Shanta Homes was the same as the legal description in the earlier

deeds.

Also in September of 1987, C. Drake Cazier and his wife, Lyn, moved into the house with their children. Shanta Homes defaulted on the payments to Goldome Realty Credit Corp. after January of 1988. According to the Affidavit of C. Drake Cazier dated October 11, 1991, the defaults were precipitated by a sudden increase in the amount of the payments from approximately $500.00 to $728.00.

In 1989, foreclosure proceedings were commenced by Harvey Richardson, who had been substituted as Trustee on the Deed of Trust.

According to C. Drake Cazier's Affidavit dated October 11, 1991, he was preparing for the construction of fences on the property but, in his own survey, he could not get the boundary for the one acre parcel in the proper location. He contacted Earl E. Sanders, who performed the surveying for the Holiday Acres Subdivision. Mr. Sanders stated in his Affidavit dated October 10, 1991, that all points for the survey of Holiday Acres originated at a corner set by Mr. Ellersick rather than the section corner set by the State of Idaho.

On or about March 20, 1989, C. Drake

Cazier and Harvey Richardson had a conversation regarding a potential dispute over the location of the house upon the property subject to the Deed of Trust. The legal description stated as follows: A parcel of land in the West half of the Northwest quarter of the Northwest quarter of Section 22, Township 53 North, Range 4 West, Boise Meridian, Kootenai County, State of Idaho, and more particularly described as follows: Beginning at the Northwest corner of Section 22; thence South 00 06' 57" East along the West boundary of Section 22, 1336.51 feet to the Northwest corner of Lot 1, Block 3 of Holiday Ranch Estates; thence North 89 06'29" East along the North boundary of Lot 1, Block 3, 518.40 feet to the True Point of Beginning; thence, North 22 44'30" West, 258.54; thence North 89 06'29" East, 240.00 feet; thence South 00 00'36" West 210.00 feet; thence South 89 06'29" West, 30.00 feet; thence South 89 06'29" West, 110.00 feet to the True Point of Beginning.

According to the legal description, the survey should be conducted by Beginning at the Northwest corner of Section 22 . . . ." Essentially, a possibility existed that the survey could begin in two different places because there are two different

monuments that could be used. One monument is the private Ellersick monument. If that monument is used, the house is located within the confines of the legal description for the one acre parcel. The other monument is the corner established by the Government Land Office in 1880 and re-monumented in 1984 by Gale R. Dahlman for the State of Idaho. If the second monument is used, the Defendants claim that the description is fatally flawed and the house cannot be located on the one acre parcel.

The initial proceedings were halted. According to an Affidavit of Harry D. Richardson dated September 13, 1991 he was told by a surveyor in April of 1990 that the house was on the property. Foreclosure proceedings were commenced a second time in May of 1990. A foreclosure sale took place on October 26, 1990. Goldome Realty Corporation purchased the property at the foreclosure sale for $76,227.24. A Trustee's Deed was delivered to Goldome Realty Credit Corporation; the Trustee's Deed was recorded in Kootenai County, Idaho, on November 12, 1990. C. Drake Cazier and his family refused to vacate the house. C. Drake Cazier operates McIntosh Management, Inc., from the house. On December 24, 1990 Goldome Realty Credit

Corporation filed a Complaint in the instant action alleging unlawful detainer and seeking restitution of the premises. The instant action was assigned to the Magistrate's Division of the District Court.

In his Answer, C. Drake Cazier claimed that the "legal description is flawed in that no such parcel of land can exist as described in the complaint"

In July of 1991, a survey was performed by Patrick J. Moore. Mr Moore is a land surveyor who is licensed in Washington and Idaho. He is employed by Inland Pacific Engineering in Spokane, Washington. He has conducted thousands of surveys of privately-held parcels of land in Washington and Idaho. Mr. Moore concluded that the legal description for the one acre parcel describes a surveyable piece of property. Mr. Moore has also concluded that the house is located within the property boundaries as established by the legal description. See Affidavit of Patrick J. Moore dated July 26, 1991.

There are two different monuments marking the Northwest corner of Section 22, Township 53 North, Range 4 West, Boise Meridian in Kootenai County, Idaho. The legal description does not specify whether

the private survey monument or the State of Idaho monument is to be used for the beginning point.

The Plaintiff argues that the monument established by private survey was used to create the legal description here as well as to survey the adjoining Holiday Acres Subdivision, to which the legal description is tied. It is Mr. Moore's opinion that the private survey monument is the one referenced in the first call, which makes the entire legal description relevant and accurate. Mr. Moore states that, as a general rule, calls in a legal description to a record monument take precedence over bearings and distances. Thus, the second call to the record monument of the "the Northwest Corner of Lot 1 of Block 3 of Holiday Ranch Estates," as set forth in the legal description, takes priority over discrepancies which might exist in the bearing and distance calls set forth in the legal description prior to the call to this subdivision monument. Alternatively, Mr. Moore explains that the problem can be resolved by focusing upon the record monument of the Northwest corner of Lot 1, Block 3 of Holiday Ranch Estates, and proceeding from that point, thus ignoring the difficulty with the prior bearing.

According to the Plaintiff, it is the intent of the legal description to arrive at the N.W. corner of Lot 1, Block 3 Holiday Ranch Estates, and there is no dispute about the location of this monument. It is further undisputed that, if a survey is started at this monument, the house is within the one acre lot. See Affidavit of Patrick J. Moore dated October 23, 1991.

C. Drake Cazier's argument to the contrary is based upon the premise that, if you start at the government monument marking the Northwest corner of Section 22, and follow the directions, you do not arrive at the Northwest corner of Lot 1, Block 3 of Holiday Ranch Estates. Therefore, the legal description is fatally flawed.

Goldome Realty Credit Corporation moved for summary judgment. On December 30, 1991, the Honorable John P. Luster issued a DECISION OF MOTION FOR SUMMARY JUDGMENT, wherein he denied Goldome's motion. On March 4, 1993, the Defendants filed a MOTION TO DISMISS. The motion was based upon the grounds that the magistrate was without jurisdiction to hear the case. The matter went to TRIAL on March 17, 1993 and May 13, 1993. At the close of the

Plaintiff's case, Judge Luster decided that the matter should not be an unlawful detainer action and it should properly be in the District Court. An ORDER DISMISSING CLAIM, GRANTING LEAVE TO FILE AMENDED COMPLAINT, AND TRANSFERRING AMENDED COMPLAINT was filed on June 4, 1993. The FIRST AMENDED COMPLAINT, which was filed on June 4, 1993, alleged the following causes of action: (1) Ejectment, (2) Common Law Trespass, and (3) Quiet Title. The Plaintiff seeks judgment for possession of the property. a Writ of Possession instruction an officer to remove the Caziers from the property, judgment for the value of the occupation of the property during the Caziers' period of wrongful possession, judgment for damages for trespass, declaration of the correct location of the boundary line of the property, and declaration of quiet title in the Plaintiff.

On July 29, 1993, C. Drake Cazier filed an ANSWER TO FIRST AMENDED COMPLAINT. In the Answer, it is asserted that the legal description is so flawed that it cannot be surveyed and no such property can exist nor can boundaries be located; since the Plaintiff owns no property, Defendants cannot possess it. According to the

Defendants, Plaintiff's surveyor, Patrick J. Moore, produced two different plats showing different possible locations of the property during the Trial in the Magistrate's Division. It appears that C. Drake Cazier is contending that the description is so defective that the lot is not a surveyable piece of land or that, alternatively, even if the lot is surveyable, the house is not located on the lot.

On October 22, 1993, KeyCorp filed PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT. The motion was supported by PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT and AFFIDAVIT OF ROBERT A FAUCHER. In opposition to the Plaintiff's motion, the Defendants lodged DEFENDANT'S MEMORANDUM IN OPPOSITION OF MOTION FOR SUMMARY JUDGMENT and filed THIRD AFFIDAVIT OF C. DRAKE CAZIER. The Plaintiff also lodged PLAINTIFF'S REPLY BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT. In addition, the record in the case has been reviewed.

DISCUSSION

Standards for Summary Judgment

Rule 56(c), Idaho Rules of Civil Procedure, provides for summary judgment where there is no genuine issue as to any

material fact and moving party is entitled to judgment as a matter of law. In order to make that determination, the court shall look to "the pleadings, deposition, and admissions on file, together with the affidavits, if any . . . ."

On a motion for summary judgment, the facts in the record are to be liberally construed in favor of the party opposing the motion. The party opposing the motion is to be given the benefit of all favorable inferences which might be reasonably drawn from the evidence. Bonz v. Sudweeks, 119 Idaho 539, 808 P.2d 876 (1991). The burden of proving the absence of genuine issues of material facts is upon the moving party. Petricevich v. Salmon River Canal Co., 92 Idaho 865, 452 P.2d 362 (1969).

Once the moving party has properly supported the motion for summary judgment, the non-moving party must present opposing evidence in the form of depositions, discovery responses, and affidavits. The non-moving party's case must consist of more than speculation; it must create a genuine issue regarding a material fact. A mere scintilla of evidence is not enough to create a genuine issue. G & M Farms v. Funk Irrigation Co., 119 Idaho 514, 808 P.2d 851 (1991); Petricevich v. Salmon River Canal

Co., supra.

If there are no genuine issues of material fact, the court will determine whether a party is entitled to judgment as a matter of law. Zumwalt v. Stephan, Balleisen & Slavin, 113 Idaho 822, 748 P.2d 406 (Ct.App. 1987), rev. denied (1988).

According to Berg v. Fairman, 107 Idaho 441, 444, 690 P.2d 896 (1984), the

> "purpose of summary judgment proceedings is to eliminate the necessity of trial where facts are not in dispute and where existent and undisputed facts lead to a conclusion of law which is certain."

Legal Description of the Property.

The Legal description of the property at issue here has been set forth above. There is no dispute regarding the existence of the legal description nor is there any dispute as to what words make up that description.

According to W. Robillard & L. Bouman, Clark on Surveying and Boundaries 18.04 (6th ed. 1992),

> [t]he purpose of the description is to furnish the means of identification for the property conveyed. A description will be sufficient when the property can be

identified from its words, either by a person who is familiar with the locality or by an actual survey.

The question becomes whether, in the instant case, a valid description exists or whether the description fails to describe the land to be located. Thus, the language of the description of the property must be examined.

A. THE RULES OF LAW FOR CONSTRUCTION OF PROPERTY DESCRIPTIONS

In construing the language, the trial court should, if possible, give effect to the intent of the parties. If it is plain and unambiguous, the general rule is that the intent must be ascertained from the language of the description itself. However, where a description is ambiguous, the interpretation of the grantor's intent becomes a question of fact to be determined from the instrument itself and from all the surrounding facts and circumstances. Bumgarner v. Bumgarner, 93.20 I.S.C.R. 1193 (Ct.App. October 4, 1993); Vanoski v. Thomson, 114 Idaho 381, 757 P.2d 244 (Ct.App. 1988).

According to Hogan v. Blakney, 73 Idaho 274, 279, 251 P.2d 209 (1952),

the primary rule to be observed is

> that the real intention of the parties, particularly that of the grantor, is to be sought and carried out whenever possible. . . . The tendency of modern decisions is to disregard technicalities and treat all uncertainties in a conveyance as ambiguities subject to be cleared up by resort to the intention of the parties as gathered from the instrument itself, the circumstances attending and leading up to its execution, and the subject matter and the situation of the parties as of that time.

General Rules of construction of descriptions have been stated in 12 Am.Jur.2d Boundaries 2 as follows:

> [C]alls carrying out the intention will be given effect. To this end, the court places itself as nearly as possible in the situation of the parties to the conveyance at the time of its execution, and will consider the construction given by the parties, as shown by their acts and admissions, as the true one, unless the contrary clearly appears....[T]he least certainty must yield to the greater certainty in description.... [A]ll

words and descriptions used in the grant must be harmonized and given effect if possible....

Where there are inconsistencies or uncertainties, the following general rules are set forth in 12 AM.Jur.2d Boundaries 64:

> All parts of the description in a conveyance should be allowed to stand if possible, and none of the calls should be rejected if they can be applied in any reasonable manner ....
>
> The various rules adopted by the court for construing and interpreting conflicts between calls of description all have for their primary purpose the ascertainment of the intention of the parties. Another basic consideration is that those particulars of the description which are uncertain and more liable to error and mistake must be governed by those which are more certain .... [A] particular is preferred over, and will control or limit, a general description ....
>
> In some cases, however, a call may be disregarded or rejected.

According to 12 Am.Jur.2d Boundaries 66:

> In determining boundaries of a tract of land, it is not permissible to

> disregard any of the calls if they can be applied and harmonized in any reasonable manner ..... An inconsistent call should be discarded if thereby all the rest of the calls are reconciled and the description perfected.... [T]he call or description which is the most certain and least liable to be incorrect, and is most consistent with the intent of the grant, should be retained, and invariably, as few calls or descriptions as possible should be disregarded.

See also Farrell v. Brown, 111 Idaho 1027, 729 P2.d 1090 (Ct.App. 1986); Meir-Nandorf v Milner, 34 Idaho 396, 201 P. 720 (1921). Furthermore, a course and distance description gives way to a conflicting call to an identified natural or artificial monument. Sun Valley Shamrock v. Travelers Leasing, 118 Idaho 116, 794 P.2 1389 1990); Campbell v. Weisbrod, 73 Idaho 82,245 P.2d 1052 (1952).

B. THE RULES OF LAW AS APPLIED TO THE FACTS OF THIS CASE

As noted above, there is no dispute regarding the fact that the description exists nor is there any dispute as to the

words that are contained in the description. Therefore, according to the primary rule of construction for descriptions, the intention of the parties must be given effect.

Initially, the language of the description must be examined. The description states that the survey begins at the "Northwest corner of Section 22 . . . ." It is undisputed that there are two different monuments at that corner. The description does not state which of the monuments is to be used. Uncertainties in a description are treated an ambiguities. Furthermore, if the survey begins at the monument set by the State of Idaho and proceeds according to the description, the second call is not in the proper place. Again, uncertainties in a description are treated as ambiguities. This Court finds that, as a matter of law, the description in ambiguous. In order to determine the intent of the parties, evidence will be gathered from the description itself, from the circumstances leading to its drafting, and from the situation of the parties as of that time.

Where there are inconsistent or conflicting calls in a description, the rules of construction provide for two

alternative methods of solution. First, if possible, the words of the description must be harmonized and given effect. That can be done by permitting the more certain particulars to govern over the particulars that are incursion and more liable to error and mistake. Also, a particular is preferred over a general description. A course and bearing description gives way to a conflicting call to an identified monument. Viewing the evidence most favorable to the Defendants, who are the non-moving parties here, the survey begins at the "Northwest corner of Section 22," which is marked by the monument set by the State of Idaho. In the instant case, there is no dispute as to the location of the second call, which is to the "Northwest corner of Lot 1, Block 3 of Holiday Ranch Estates." From that point on, the description can be surveyed and effect can be given to the rest of the calls, thus perfecting the description. The second call is the most certain and least likely to be incorrect, since it is identifiable at one location. The course and distance description from the monument set by the State of Idaho gives way to the identified monument in the second call. Thus, the words of the description can be given

effect.

Second, an inconsistent call can be discarded if the rest of the calls are reconciled by doing so. The call which is the most certain and most consistent with the intent of the grant should be retained. Again, viewing the evidence most favorably to the Defendant, the fist call is to the monument set by the State of Idaho at the "northwest corner of Section 22." If the survey begins at that point, none of the other calls and descriptions can be given effect. However, if the survey begins at the Northwest corner of Lot 1, Block 3 of Holiday Ranch Estates," the remainder of the description could be given effect. Therefore, the first call is an inconsistent call and can be discarded since all of the other descriptions are reconciled by doing so. As few calls or descriptions as possible should be discarded. The greatest number of descriptions are retained and the fewest number of descriptions are discarded if the survey begins at the second call. Furthermore, the first call could be located at two places depending upon which monument was used; however, it is undisputed that there is only one location for the second call. Thus, the second call

is the most certain and should be retained.

The intent of the grant must also be examined. There was testimony from James E. Yarborough, the person who requested that the description be drafted, that his intent was to have a parcel of real property which was one acre in size and which included the house upon it while having an outlet to the adjoining road. The purpose for granting the Deed of Trust for the one acre was to obtain financing for the house. Yarborough believed that the description drafted by the surveyor included the property where the house now stands. There is no evidence that subsequent parties intended otherwise at the time that conveyances or contracts were entered into; i.e., there is no evidence that subsequent parties intended otherwise until the instant dispute arose.

The Defendants have argued that the survey must begin with the "Northwest corner of Section 22" and that, because it cannot be determined therefrom, the description is flawed so that no such parcel of land can exist as described. However, where there is a record corner that is certain, the boundary lines of the survey may be determined by commencing at that point instead of at the beginning

corner. In the instant case, the first call is to the "Northwest corner of Section 22," which is uncertain. The second call is to the "Northwest corner of Lot 1, Block 3 of Holiday Ranch Estates," which is a record corner that is certain. Therefore, the second call can be applied so that the description can be surveyed.

This Court has reviewed the general legal rules applying to construction of descriptions of real property and has applied those legal rules to the facts in the instant case. The calls and descriptions may be harmonized or the first call may by discarded. However, the result is the same and it is supported by the extrinsic evidence as to the intent of the grantor who first drafted the description. This Court concludes that the survey must be harmonized to include or must commence at the second call of the "Northwest corner of Lot 1, Block 3 of Holiday Ranch Estates" and proceed therefrom.

The evidence which is in the record further supports the conclusion that the house is upon the real property as it is described. See Record of Survey by Patrick J. Moore in July 1991.

Thus the Plaintiff's Motion for Summary Judgment shall be granted as to the

actions for ejectment and quiet title. With regard to the action for quiet title, the boundary of the real property is as set forth in the Record of Survey by Patrick J. Moore in July 1991. However, as to the action for common law trespass, the Court denies the Motion for Summary Judgment, but only on the issue of damages until there is further evidence as to the amount due.

This Court has reviewed the Affidavits of Dell Cazier. However, applying the rules set forth above, this Court has found from the evidence in the record that, even if the survey begins at the monument set by the State of Idaho, the house is located on the one acre parcel. While there may be some deviations in the survey after the second call, the Defendants have not produced any evidence to show that there is a genuine issue of material fact. There must be more than some speculation; a mere scintilla of evidence will not create a genuine issue. Likewise, where there is no evidence of the rental value of the property, this Court cannot grant judgment. However, where the undisputed material facts lead to a conclusion of law which is certain, it is appropriate to grant summary judgment and eliminate the necessity of a trial.

Although the Defendants have stated other question, they have not set forth facts to create a genuine issue. Again, they must do more than speculate. See Sparks v. St. Lukes Regional Medical Center, LTD, 115 Idaho 505, 508, 768 P.2d 768 (1989), wherein it is stated that

> "[i}f a party resists summary judgment, it is his responsibility to place in the record before the trial court the existence of controverted material facts which require resolution at trial."

CONCLUSION AND ORDER

Based upon the foregoing discussion, it is hereby ORDERED that the Plaintiff's Motion for Summary Judgment be and the same is hereby granted as to the causes of action for ejectment and quiet title as set forth herein and the same is hereby denied with regard to the issue of damages on the cause of action for trespass as set forth herein.

DATED this 26th day of January, 1994

/s/Gary M. Haman
District Judge

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

KEYCORP MORTGAGE INC.,)
f/k/a GOLDOME REALTY CREDIT CORP.,)
Plaintiff,)
vs.)
C. DRAKE CAZIER and LYN CAZIER,)
husband and wife, SHANTA HOMES,)
INC., JOHN DOES I THROUGH IX,)
MCINTOSH MANAGEMENT, INC., JOHN)
DOES X THROUGH XIX,)
Defendant.)

CASE NO. 83761

MEMORANDUM OPINION AND ORDER IN RE: MOTION TO RECONSIDER

(filed June 14, 1994)

In an earlier Memorandum Opinion and Order, KeyCorp's Motion for Summary Judgment was granted in part. Defendant C. Drake Cazier has now moved for reconsideration. Motion denied.

Larry E. Prince and Robert A. Faucher, HOLLAND & HART, Attorneys for Plaintiff.

C. Drake Cazier, Pro Se.

FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background set forth in the prior MEMORANDUM OPINION AND ORDER IN RE: SUMMARY JUDGMENT, which is dated January 26, 1994, is incorporated herein. This court previously granted Summary Judgment to KeyCorp on the quiet title and ejectment causes of action and held that the Caziers were liable to KeyCorp for trespass, but reserved judgment on the amount of damages.

On February 2, 1994, C. Drake Cazier filed DEFENDANTS MOTION FOR REDETERMINATION OF SUMMARY JUDGMENT. C. Drake Cazier has filed the following documents:

1. AFFIDAVIT OF BRUCE ANDERSON, dated February 28, 1994,
2. COMMENTS AND AFFIDAVIT OF WALTER G. ROBILLARD ESQ., RLS, dated January 25, 1994, and
3. SECOND AFFIDAVIT IN SUPPORT OF ORIGINAL AFFIDAVIT OF WALTER G. ROBILLARD, ESQ., RLS, dated February 2, 1994.

KeyCorp has filed PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' AFFIDAVITS on ground that the affidavits contain conclusions of law that are inadmissible as evidence. The motion was denied at the hearing; however, this Court will rely on the admissibility

of the evidence contained in the Affidavits at the time that such evidence is considered. C. Drake Cazier has also presented an AFFIDAVIT AND COMMENTS OF C. DRAKE CAZIER IN SUPPORT OF DEFENDANTS MOTION FOR REDETERMINATION OF SUMMARY JUDGMENT, dated February 2, 1994.[1]

On March 8, 1994, C. Drake Cazier filed DEFENDANTS MOTION FOR SUMMARY JUDGMENT TO DISMISS. On March 16, 1994, KeyCorp filed PLAINTIFF'S EX PARTE MOTION FOR AN INDEFINITE CONTINUANCE OF THE HEARING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT. KeyCorp's motion was granted.

On March 9, 1994, C. Drake Cazier filed a NOTICE OF APPEAL. The appeal was dismissed on March 25, 1994.

In response to the affidavits filed by C. Drake Cazier, KeyCorp filed an AFFIDAVIT OF JON P. MONACO, P.L.S., dated March 25, 1994. KeyCorp has also filed PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT WITH RESPECT TO ORDER ALLOWING PLAINTIFF'S SUMMARY JUDGMENT MOTION IN PART.

Both parties has submitted memorandums of law. A hearing was held on the motions.

DISCUSSION

---

[1]Although this document has been stamped and is in the court file, it does not appear to be the original document.

Standards for Motion for Reconsideration

C. Drake Cazier has filed DEFENDANTS MOTION FOR REDETERMINATION OF SUMMARY JUDGMENT. It appears that this should properly be a motion for reconsideration.

Rule 11(a)(2)(B), Idaho Rules of Civil Procedure, provides for a "Motion for Reconsideration." When considering a motion for reconsideration of an interlocutory order pursuant to Rule 11(a)(2)(B), the trial court must take into account any new facts presented by the moving party that bear on the correctness of the order. The burden is on the moving party to bring the court's attention to the new facts. Coeur d' Alene Mining Co. v. First National Bank of North Idaho, 118 Idaho 812, 800 P. 2d 1026 (1990).

The applicable law for this case was stated in the previous MEMORANDUM OPINION AND ORDER IN RE: SUMMARY JUDGMENT. The facts as they were set forth in the prior opinion have been incorporated here. Thus, the only question here is whether there are any new facts presented by C. Drake Cazier which would bear on the correctness of the previous opinion and order.

It should be noted that the motion before this Court at this time is a Motion for Reconsideration of an opinion and order

regarding a Motion for Summary Judgment. Therefore, the standards for summary judgment apply here. Specifically, any new facts that might have been presented must be material and must raise a genuine issue as to that material fact.

Presentation of New Facts by the Moving Party

To determine whether or not new material facts have been presented, this Court reviewed each of the affidavits which were filed after the date of the previous opinion and order.

In the earlier opinion and order, this Court found that the real property description was ambiguous in that there was more than one monument from which the survey could begin was undisputed earlier and remains undisputed at this time. No new facts have been presented by C. Drake Cazier which would alter this finding.

This Court then turned to interpreting the grantor's intent by looking to the instrument itself and to the surrounding facts and circumstances. The general rules of construction of descriptions of property were applied.

James E. Yarborough testified earlier that, when the description was drafted, the intention was to include the property

upon which the house was located. There is no new information which would create a genuine issue as to this fact.

There is no dispute as to the location of the second call. Again, C. Drake Cazier has not presented any new facts which would affect this finding. The general rules of construction then lead to the conclusion that the property description be harmonized to include or commence at the second call of the "Northwest corner of Lot 1, Block 3 of Holiday Ranch Estates."

It is further undisputed that, if the property description includes or commences at the second call, the house is upon the real property as it is described. Finally, C. Drake Cazier has not presented any new facts which would create a genuine issue or alter that finding.

After reviewing the affidavit evidence presented by C. Drake Cazier following the previous opinion and order, this Court finds that additional facts were presented. However, the additional facts do not change the outcome; i.e., the additional facts do not create a genuine issue of fact on the matters stated above.

During the arguments preceding the previous opinion and order, C. Drake Cazier contended that the real property

description was fatally flawed and the survey performed by Patrick J. Moore was void. At that time, this Court considered and rejected Mr. Cazier's contention based upon the undisputed facts and the legal rules of construction for property descriptions. The additional facts that were presented by C. Drake Cazier support his earlier contention. However, there are no new facts which would affect the out come here.

The real issue in this case is whether or not the house is located upon the real property described in the real property description. C. Drake Cazier has not presented even a scintilla of evidence that would show the house is not actually located upon the real property.

The focus must be upon the property description and its interpretation. This lawsuit is not about the survey itself or other technicalities. Many survey could be conducted by the basic facts will be undisputed. No matter how many surveys are conducted, there will still be two monuments from which the survey could begin and the second call will still be in the same location. Mr. Moore acknowledges that, if the government monument is used as a starting point, there is a discrepancy

between the first and second monuments. Then the general rules of construction must be applied and the conclusion will be the same. Even if the government monument is used to commence the survey, C. Drake Cazier has not presented any evidence to dispute the fact that the house is still upon he real property.[2] Thus, no matter how much argument there may be about the starting point and proper surveying methods, the final outcome remains the same and C. Drake Cazier, the moving party here, has presented no new evidence to alter this conclusion.

There are a number of other matters which should be addressed. It should be

---

[2]In his Affidavit, Jon P. Monaco states as follows:

> Mr. Moore has also provided the Court at the trial with a supplemental record of survey referred to as Exhibit no. 24. This clearly shows that the section subdivision based on the Dahlman and Kindler monuments would only alter the south and east property lines. Since the north and west property lines are unchanged, the relationship of the house to these lines remains the same. I have seen absolutely nothing in my review of this case that would suggest that there is any reason to conclude that the house at issue is not located within the boundary of the property described . . . .

noted that both Walter G. Robillard and Bruce Anderson are qualified to serve as expert witnesses and may testify in the form of an opinion. Rules 702 and 703, idaho Rules of Evidence.

The expert witnesses, however, may only testify as to their opinions on issues of fact; the expert witnesses may not give their opinions on questions of law or make conclusionary statements. Rule 704, Idaho Rules of Evidence. Therefor, only the expert opinions on issues of fact were considered here.

In his Affidavit, Walter G. Robillard refutes certain statements made by Plaintiff's counsel in memorandums and briefs. Statements in the memorandums and briefs are arguments and are not evidence of record. See Rule 56(c), Idaho Rules of Civil Procedure; Shacocass, Inc. v. Arrington Construction Co., 116 Idaho 460,776, P.2d 469 (Ct.App. 1989). Thus, any specific refutation is irrelevant.

In must also be noted that this is not a case of a lost or obliterated corner. As it has been pointed out above, this is a case involving interpretation of a real property description.

The Plaintiff has raised some other objections. For example, the Plaintiff

objects to the fact that only C. Drake Cazier filed the motion for reconsideration, although there are other defendants in this action. Due to the determination herein, that objection is moot.

In conclusion, this Court holds that the moving party, C. Drake Cazier, has not presented any new facts which could alter the outcome of the prior decision; therefore, the motion for reconsideration will be denied.

Due to the ruling on the motion for reconsideration and for the reasons stated in the prior opinion and in this opinion, DEFENDANTS MOTION FOR SUMMARY JUDGMENT TO DISMISS is also denied. Finally, PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT WITH RESPECT TO ORDER ALLOWING PLAINTIFF'S SUMMARY JUDGMENT MOTION IN PART is granted.

CONCLUSION AND ORDER

Based on the foregoing discussion, it is hereby ORDERED that DEFENDANTS MOTION FOR REDETERMINATION OF SUMMARY JUDGMENT be and the same is hereby denied, DEFENDANTS MOTION FOR SUMMARY JUDGMENT TO DISMISS is hereby denied, and PLAINTIFF'S MOTION FOR ENTRY OF FINAL JUDGMENT WITH RESPECT TO ORDER ALLOWING PLAINTIFF'S SUMMARY JUDGMENT

MOTION IN PART is granted.

DATED this 14th day of June, 1994.

/s/ Gary M. Haman

District Judge

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

KEYCORP MORTGAGE INC.,)
f/k/a GOLDOME REALTY CREDIT CORP.,)
Plaintiff,)
vs.)
C. DRAKE CAZIER and LYN CAZIER,)
husband and wife, SHANTA HOMES,)
INC., JOHN DOES I THROUGH IX,)
MCINTOSH MANAGEMENT, INC., JOHN)
DOES X THROUGH XIX,)
Defendant.)

CASE NO. 83761

JUDGMENT

(filed July 11, 1994)

Based upon the "Memorandum Opinion and Order in Re: Summary Judgement," entered January 26, 1994 herein, and upon the "Memorandum Opinion and Order in Re: Motion to Reconsider," entered June 14, 1994 herein,

1. IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE that Plaintiff KeyCorp Mortgage Inc., f/k/a Goldome Realty Credit Corp. ("Plaintiff") was continually since October

26, 1990, and now is, the owner in fee simple and entitled to possession of all that certain real property situated in the County of Kootenai, State of Idaho, and which is described at Exhibit A attached hereto (the "Property"); that the claims of the Defendants C. Drake Cazier, Lyn Cazier, Shanta Homes, Inc. and McIntosh Management, Inc. (collectively, the "Defendants") and all who claim title under them in and to the Property, are without any right whatsoever, and that said Defendants have no right, title, interest, claim, lien or estate whatsoever, in or upon the Property, or any part thereof, and said Defendants and all persons claiming under them are hereby enjoined and debarred from claiming or asserting any estate, right, title, interest in, or claim or lien upon said real property, or any part thereof.

2. IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE that the boundaries of the Property and the location of the improvements thereon are set forth in that record of survey attached hereto as Exhibit B, which record of survey was recorded as instrument no. 1228394 in the office of the recorder of Kootenai County, Idaho on August 18, 1991.

3. IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER, ADJUDGE AND DECREE that Plaintiff recover against the defendants the possession of the Property, including the house located thereon, which house has the street address of West 3025 Summer Road, Athol, Idaho; and it is hereby ordered and decreed that the Defendants not unlawfully withhold from Plaintiff the possession of the Property; and it is ordered and decreed that an appropriate writ issue to the Sheriff of Kootenai County, Idaho, directing him to turn out the Defendants, and all of them, and all of their chattels, from the Property, and place Plaintiff in possession thereof.

4. IT IS HEREBY ORDERED, ADJUDGED AND DECREED, AND THIS DOES ORDER ADJUDGE AND DECREE that the Defendants, and each of them have been trespassers upon the Property continually from and after November 5, 1990, through and including the date hereof, and shall continue to be trespassers until the date that they quit possession of the Property, together with their chattels, and that the Defendants are, and each of them is, jointly and severally liable in damages to Plaintiff for such trespass in such amount that this court shall after the date hereof

determine.

The award of damages, prejudgment interest, postjudgment interest, costs and attorney's fees shall be determined through appropriate motions and proceedings and shall amend this judgment.

DATED this 6th day of July, 1994.

/s/ Gary M. Haman

District Judge

RULE 54(B) CERTIFICATE

With respect to the issues determined by the above judgment, it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason for delay of entry of final judgment, and that the court has and does hereby direct that the above judgment shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED this 6th day of July, 1994.

/s/ Gary M. Haman
District Judge

EXHIBIT A

A parcel of land in the West half of the Northwest Quarter of Section 22, Township 53 North, Range 4 West, Boise Meridian, Kootenai County, Idaho, more particularly described as follows:

BEGINNING at the Northwest corner of Section 22;

thence, South 0 06'57" East along the West boundary of Section 22, 1336.51 feet to the Northwest corner of Lot 1, Block 3 of Holiday Ranch Estates;

thence, North 89 06'29" East along the North boundary of Lot 1, Block 3, 518.40 feet to the TRUE POINT OF BEGINNING;

thence, North 22 44'30" West, 258.54 feet;

thence, North 89 06'29" East, 240.00 feet;

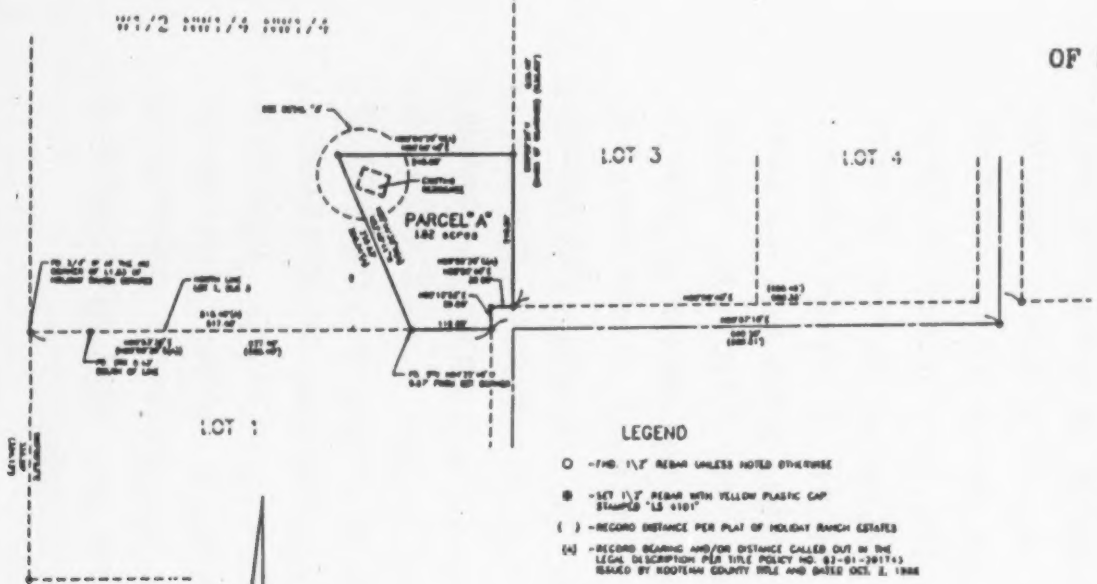
thence, South 0 00'36" West, 210.00 feet;

thence, South 89 06'29" West, 30.00 feet;

thence, South 0 00'34" West, 30.00 feet;

thence, South 89 06'29" West 110.00 feet to the TRUE POINT OF BEGINNING.

RECORD OF SURVEY
OF A
PORTION OF THE NW 1/4
OF SECTION 22, T.53 N., R.4 W., B.M.
KOOTENAI COUNTY, IDAHO
JULY 1991



BASIS OF BEARINGS

The bearing of S 00°00'24"W. on the west line of Lot 3, Block 1, as shown on the final plat of Holiday Ranch Estates was used as the basis of bearings for this map.

SURVEYOR'S NOTES

1.) This map shows the location of the existing residence only. There are other outbuildings, garages, fences, etc. that are located on Parcel "A" and outside the boundaries of Parcel "A" that are not shown.

LEGEND

- O - Found 1\2" rebar unless noted otherwise
- ● - Set 1\2" rebar with yellow plastic cap stamped "LS 6181"
- ( ) - Record distance per plat of Holiday Ranch Estates
- (R) - Record bearing and/or distance called out in the legal description per title policy no. 83-01-20174 issued by Kootenai County Title and Dated Oct. 2, 1986

SURVEYOR'S CERTIFICATE

This map correctly represents a survey made by me or under my direction in conformance with the requirements of the Survey Recording Act at the request of Harry Richardson in ... 1991

Patrick J. Ogara, Cert. No. 6181

GRAPHIC SCALE

100 0 50 100 200

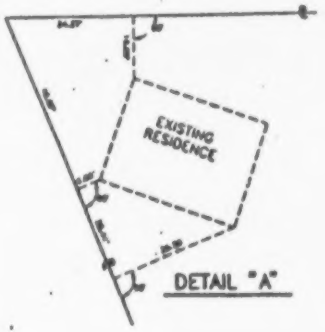
(IN FEET)

1 inch = 100 ft.

LEGAL DESCRIPTION (Furnished by others)

A parcel of land in the West half of the Northwest Quarter of the Northwest Quarter of Section 22, Township 53 North, Range 4 West, Boise Meridian, Kootenai County Idaho, more particularly described as follows:

BEGINNING at the Northwest corner of Section 22; thence, S.89°06'37"E. along the East boundary of Section 22, 1334.81 feet to the Northeast corner of Lot 1, Block 1 of HOLIDAY RANCH ESTATES; thence N.89°06'29"E. along the North boundary of Lot 1, Block 1, 316.40 feet to the TRUE POINT OF BEGINNING; thence N.27°44'30"W., 230.34 feet; thence N.89°06'29"E., 240.00 feet; thence S.00°00'24"W., 210.00 feet; thence S.89°59'29"W., 30.00 feet; thence S.00°00'24"W., 30.00 feet; thence S.89°59'29"W., 115.00 feet to the True Point of Beginning.



INLAND PACIFIC ENGINEERING
South 23 Altamont Spokane, Washington
(509) 535-1418 99202

#91067

BEST AVAILABLE COPY

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket Nos. 21438 & 21512

NATIONSBANC MORTGAGE CORPORATION OF NEW YORK,

Plaintiff-Respondent,

v.

C. DRAKE CAZIER,

Defendant-Appellant,

and

LYN CAZIER, SHANTA HOMES, INC., JOHN DOES I through IX, MC INTOSH MANAGEMENT, INC., JOHN DOES X through, XIX,

Defendants.

Case No. 21438

NATIONSBANC MORTGAGE CORPORATION OF NEW YORK,

Plaintiff-Respondent,

v.

C. DRAKE CAZIER,

Defendant,

and

LYN CAZIER, SHANTA HOMES, INC., JOHN DOES I through IX, MC INTOSH MANAGEMENT, INC., JOHN DOES X through XIX,

Defendant-Appellants

Case No 21512

1995 Opinion No. 104 Filed: November 27, 1995 Frederick C. Lyon, Clerk

Consolidated appeals from the District Court of the First Judicial District, State of Idaho, Kootenai County, Hon. Gary M. Haman, District Judge.

Order granting summary judgement in ejectment, trespass, and quiet title action, affirmed.

C. Drake Cazier, Athol, pro se appellant.

David A. Frazier, Coeur d'Alene, for all other appellants.

Holland & Hart, Boise, for respondent. Robert A. Faucher
Argued.

PERRY, Judge

This dispute centers on a one-acre parcel of land located in Athol, Idaho. Keycorp Mortgage, Inc., [3] which was the successor beneficiary of a deed of trust and purchaser upon foreclosure of the deed

---

1 By order, and over objectionof the applellant, C. Drake Cazier, the Court of Appeals allkowed substitution of Nationsbanc Mortgage Corporation of New York as respondent on appeal. Nationsbanc, formerly known as Keycorp Mortgage, Inc., was known as Goldome Realty Credit Corp. at the time of the foreclosure of the deed of trust. For convenience, the respondent will be referred to as Keycorp throughout this opinion.

of trust, brought suit to evict C. Drake Cazier and his family from the property. Keycorp was awarded summary judgement on its claims of ejectment, trespass and quiet title, with damages for trespass to be determined at trial. Caziers appealed from the order granting summary judgement to Keycorp and from the denial of C. Drake Cazier's motion for reconsideration of the summary judgement award. We affirm.

I

FACTS AND PROCEDURE

In September 1987, James Yarobrough sold to Shanta Homes, Inc., a one-acre parcel, which was carved out of a larger twenty- acre parcel that Yarobrough was purchasing under an executory land contract. In conjunction with the warranty deed, Shanta Homes assumed Yarobrough's obligations as the grantor of the deed of trust securing the one-acre parcel. Yarobrough also assigned to Shanta Homes his purchases's interest under the contract covering the remaining nineteen acres. C. Drake Cazier, the sole shareholder of Shanta Homes, and his family took possession of the property. Cazier operated Shanta Homes and Mcintosh Management, Inc., from the residence located on the one-acre parcel. When

Shanta HOmes defaulted on its obligations under the deed of trust on the one- acre parcel, the trustee foreclosed. In the fall of 1990, the trustee conveyed the one-acre parcel to Keycorp by a deed on foreclosure.

From the date of the default in 1989, the Caziers continued to live on the property, paying nothing. Even after the foreclosure sale in 1990, the Caziers refused to surrender possession of the home located on the one-acre parcel. Keycorp, therefore, began unlawful detainer proceedings in the magistrate division of the district court, seeding to evict the Caziers from the property. At a court trial scheduled for March 13, 1993, the magistrate heard testimony, but continued the matter to May 13, 1993. At that time, the Caziers' counsel argued a motion to dismiss the matter, asserting that the unlawful detainer action had bee transformed into an action to resolve questions of ownership and to quiet title to the property--issues which the magistrate lacked authority to decide. The magistrate concluded, based upon evidence presented by the parties, that an unlawful detainer action did not lie. The magistrate granted the motion to dismiss

the unlawful detainer claim with prejudice. The magistrate also granted Keycorp's oral motion to amend its complaint to allege claims of ejectment, trespass and quiet title and for an order transferring the case to the district court. An order, dated JUne 4, 1993, incorporated the magistrate's rulings on the Cazier's motion to dismiss and Keycorp's motion to amend the complaint and to transfer the case to the district court.

The Caziers, appearing pro se, filed separate answers to Keycorp's first amended complaint which had been filed in the district court. Thereafter, Keycorp filed a motion for summary judgment on all of its causes of action. The district court granted summary judgment on all of its causes of action. The district court granted summary judgement to Keycorp, reserving the issue of trespass damages for trial. C. Drake Cazier moved for reconsideration of the district court's order. C. Drake Cazier then filed his own motion for summary judgement and dismissal, claiming that "the legal description {of the one-acre house lot} is flawed in that no such parcel of land can exist as described in the complaint." By order of June 14, 1994, the district court denied

Cazier's motions for reconsideration and for summary judgement.

The district court entered a final judgment in favor of Keycorp on July 11, 1994. The district court held that Keycorp owned the one-acre lot were in accord with the survey conducted by Patrick Moore; that a writ of eviction was to issue; and that the Caziers, as trespassers, were liable for the damages. From this judgment, the Caziers separately appeal.

II.

ANALYSIS

A. Order Transferring Amended Complaint to the District Court

We consider first the Caziers' contention that it was error for the magistrate to transfer the case to the district court following the dismissal of the unlawful detainer claim. Because there was only one claim in the complaint before the magistrate, the Caziers assert that dismissal of the unlawful detainer claim effectively ended the case and the magistrate's jurisdiction over the dispute.

The magistrate issued an order entitled "Order Dismissing Claim, Granting Leave to File Amended Complaint, and Transferring Amended Complaint." In addition to the language contained in the

order, the court minutes from the May 13, 1993, hearing further explained the magistrate's rationale. The magistrate found that the evidence showed that the Caziers were tenants at sufferance and not in a landlord-tenant relationship as required for an unlawful detainer action. The magistrate concluded that it had no authority to proceed further and dismissed the unlawful detainer claim. Upon the request of Keycorp, the magistrate then determined that is was appropriate to grant Keycorp's motion for leave to amend it's complaint to assert claims of ejectment, trespass and quiet title and to transfer the case to the district court.

The decision to grant or deny a motion to amend a complaint is left to the sound of discretion of the trial court. I.R.C.P. 15(a). In this case where the magistrate took testimony on Keycorp's claim, the record contained allegation which, if proven, would entitle Keycorp to the relief being claimed in the amended complaint. See Black Canyon Racquetball v. Idaho First Nat'l Bank, 119 Idaho 171, 178, 804 P.2d 900, 907 (1991), quoting Bissett v. State, 111 Idaho 865, 869, 727 P.2d 1293, 1296 (Ct. App. 1986). Because the amended complaint conformed to the proof

presented at trial, the magistrate acted within its discretion in allowing amendment. I.R.C.P.15(b). The complaint, as amended, designated claims that could not be decided by the magistrate under I.C. & 1- 2208. Thus, a determination that the action was beyond the authority of the magistrate required transfer of the action to district court. I.R.C.P. 8(a)(2). Therefore, there was no error with regard to any of the actions taken by the magistrate.

B. Summary Judgment

The Caziers maintain that the district court erred in granting summary judgment to Keycorp. They argue that the district court relied on a survey prepared by keycorp's expert, Patrick Moore, which did not use the government monument, was not tied to any government survey and was not in accordance with the United States Government Manual for Survey Instructions. The Caziers argue that Keycorp acquired no interest in the land by virtue of the foreclosure sale and deed because the legal description to the one- acre parcel in the deed of trust cannot be surveyed to correctly identify the perimeters of the house lot within the WEst 1/2 of the Northwest 1/4 of Section 22, Township 53

North, Range 4 West, Boise Meridian.

Our review of a summary judgment is limited to determining whether there exists a genuine issue of material fact and whether the prevailing party is entitled to judgment as a matter of law. Anderson v. City of Pocatello, 112 Idaho 176, 731 P.2d 171 (1986); Gro-Mor, Inc. v. Butts, 109 Idaho 1020, 712 P.2d 721(Ct. App. 1985). Summary judgment is proper if the pleadings, depositions and admissions on file, together with affidavits, have been considered in a light most favorable to the party opposing the motion and show that there is no genuine issue of fact. Palmer V. Idaho Bank and Trust, 100 Idaho 642, 603 P.2d 597 (1979).

The district court framed the question on summary judgment as whether a valid description existed or whether the description failed to describe the land to be located. The district court held as a matter of law that the description of the one-acre lot was ambiguous. The district court then applied rules of construction the legal description and considered the intent of the parties. Finding that the description could be surveyed and that the house was situated on the land within the description , the district court granted

summary judgment in favor of Keycorp.

The fundamental principle underlying all of the rules of construction of deeds, as well as all others contractual instruments, is that the courts must seek and give effect to the intention of the parties. Campbell v Weisbrod, 73 Idaho 82, 89, 245 P.2d 1052, 1059 (1952). If a deed is ambiguous, interpretation of the instrument is a matter of fact for the trier of fact. Latham v. Garner, 105 Idaho 8454, 673 P.2d 1048 (1983). In interpreting and construing deeds, uncertainties should be treated as ambiguities subject to be cleared up by resort to intention of the parties as gathered from the deed, circumstances attending and leading up to its execution, subject matter and situation of the parties at tne time. Hogan v. Blakney, 73 Idaho 274, 251 P.2d 209 (19530. The grantor's intent becomes a question of fact to be determined from the instrument itself and from all surrounding facts and circumstances. Burngarner v. Vumgamer, 124 Idaho 629, 862, P.2d 321 (Ct. App. 1993).

Keycorp supported its motion for summary judgement with excerpts of testimony from the transcript of the trial before the magistrate. Included therein

was testimony from James Yarobrough, grantor o the one-acre parcel. Yarobrough indicated that he had hired a surveyor in 1982 for the purpose and with the intent to draft a legal description for the one-acre parcel which was to encompass the home being built on the property and an access to the road. In opposition to the summary judgement motion, the Caziers failed to submit any evidence disputing that the legal description was intended to describe the one-acre house lot which was subject to the deed of trust.

Keycorp also offered the testimony of its expert, Patrick Moore, to show that the legal description could be surveyed and the house located within the boundaries of the description. In opposition, the Caziers argued that the legal description was flawed because two possible monuments were on the ground which could have marked the point of beginning. The Caziers asserted that the choice of monuments could locate the house either in or out of the described parcel. Moore acknowledged the potential of two northwest corners of Section 22, but determined that the first and second calls in the legal description (referring to the Section 22 corner and the west boundary line) were not necessary to his survey

drawing of the legal description of the one-acre parcel. Furthermore, Moore concluded that the legal description referred to a recorded subdivision of the adjoining Holiday Ranch Estates, whose pertinent monuments Moore readily located.

When the moving party has met its initial burden on summary judgement of establishing the absence of a genuine issue of material fact, the non-moving party then has the burden of producing evidence to create a genuine issue of material fact. Thomson v. Idaho Insurance Agency, Inc., 126 Idaho 527, 530-31, 887 p.2d 1034, 1037-38(1994). Because of a lack of evidence in support of the Cazier's arguments, the district court did not err in accepting the uncontroverted testimony of Keycorp's witness, Moore, asserting the viability of the legal description as the one- acre house lot.

It should be noted that although the Caziers did not file a cross motion for summary judgement, C. Drake Cazier filed a motion for summary judgement one month after the district court's award of summary judgement on Keycorp's motion. In his motion, Cazier attempted to reargue that the legal description conveyed nothing and was a nullity. The subsequent denial of

Cazier's motion for summary judgement, though raised as an issue on appeal, was not an appealable order and not reviewable. Ernst v. Hemenway and Moser Co., Inc., 126, Idaho 980, 895, P.2d 581 (Ct. App. 1995), citing Keeler v. Keeler, 124 Idaho 407, 410, 860 P.2d 23, 26 (Ct. App. 1993). We affirm the order granting summary judgement in favor of Keycorp.

C. Denial of Motion for Reconsideration

Attempting once again to further argue in opposition to Keycorp's motion for summary judgement, C. Drake Cazier moved the district court to reconsider its award of summary judgement. In support of his reconsideration motion, Cazier presented affidavits of two new witnesses, who were surveyors, to attack the correctness of the Moore survey. Cazier also argued for the first time that Moore Survey did not comply with the government manual, but offered no correct, independent survey.

The district court held that the witnesses qualified as experts to testify in the form of an opinion on questions of fact, but they could not give their opinions of law or make conclusionary statements. The district court concluded that Cazier had presented no new evidence which created a genuine issue of material

fact, and the district court denied the motion for reconsideration.

On a motion for reconsideration pursuant to I.R.C.P.11(a)(2)(B), the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. The Burden is on the moving party to bring the trial court's attention to the new facts. Coeur d'Alene Mining Co. v. First Nat'l Bank, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). We concur in the district court's findings however that:

> No matter how many surveys are conducted, there will still be two monuments from which the survey could begin and the second call will still be in the same location . . .(I)f the government monument is used as a starting point, there is a discrepancy between the first and second monuments. Then the general rules of construction must be applied and the conclusion will be the same. Even if the government monument is used to commence the survey(as Cazier contends) C. Drake Cazier has not presented any evidence to dispute the fact that the house is still upon the

real property. Thus, no matter how much argument there may be about the starting point and proper surveying methods, the final outcome remains the same, and C. Drake Cazier, the moving party here, has presented no evidence to alter that conclusion.

Therefore, we affirm the district court's denial of C. Drake Cazier's motion for reconsideration of the award of summary judgement.

III.

CONCLUSION

We hold that there was no error in the order transferring Keycorp's amended complaint to the district court following the magistrate's dismissal of the unlawful detainer claim. We affirm the order awarding summary judgement in favor of Keycorp as well as the order denying Cazier's motion for reconsideration of the summary judgement award.

We grant Keycorp's request for attorneys fees under I.C. & 12-120(3), on the basis o the language in the deed of trust providing for attorneys fees in any action purporting to the affect the security of the deed of trust or the rights of the beneficiary. The appellants, the Cazier, Shanta Homes and McIntosh, as

tenants at sufferance, are therefore liable for attorney fees. Costs on appeal are also awarded to respondent, Keycorp.

Chief Judge WALTERS and Judge LANSING, CONCUR.

In the Supreme Court of the State of Idaho

NATIONBANC MORTGAGE CORPORATION OF NEW YORK,

Plaintiff-Respondent,

v.

C. DRAKE CAZIER

Defendant-Appellant

and

LYN CAZIER, SHANTA HOMES, INC., JOHN DOES I THROUGH IX, MCINTOSH MANAGEMENT, INC., JOHN DOES X THROUGH XIX,

Defendants.

The Appellant having filed a PETITION FOR REVIEW on December 18, 1995 and supporting BRIEF on January 2, 1996, seeking review of the Opinion of the Court of Appeals filed November 27, 1995; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REVIEW be, and hereby is, DENIED.

DATED this 23rd day of January 1996.

By Order of the Supreme Court

/s/ Lois Dawson Chief Deputy Clerk for

Frederick C. Lyon, Clerk

cc: Counsel of Record

District Court Clerk

District Judge Gary M. Haman

Appendix A

9 092

CORNER PERPETUATION AND FILING RECORD

(In compliance with Title 55, Chapter 16, Sections 1601-1612 CORNER PERPETUATION AND FILING /

RECORD OF ORIGINAL CORNER: Date of Survey Nov 1880 Surveyor John B. David

80 Ch. set granite stone 16 x 10 x 6 marked 3 notches on the S & E 12 in. in the ground as per instructions for cor. to Secs. 15, 16, 21 & 2: from which
A Tamarack tree 18 in. in diam. bears North 70° West 16 lks. dist.
A Pine tree 12 in. in ciam. bears North 66° East 124 lks. dist.
A Pine tree 20 in. in diam. bears South 20°15' East 78 lks. dist.
A Tamarack tree 15 in. in diam. bears South 57° West 54 lks. dist.

DESCRIPTION OF CORNER EVIDENCE FOUND:

Found stone with remains of BT's.

DESCRIPTION OF MONUMENT AND ACCESSORIES ESTABLISHED TO PERPETUATE THE LOCATION OF THIS C

Set conc. mon. 36 in. long tapered from 9 in. diam. at the lower end to 6 in. diam. at the upper end where a 3 1/2 in. diam. brass disk is set from which
A Pine tree 12 in. in diam. bears North 46°27' East 26.1 feet dist. scribed S15BT with B.T. tag and nail in base of tree.
A Tamarack tree 10 in. in diam. bears North 30°32' West 29.8 feet dist. scribed S16BT with B.T. tag and nail in base of tree.
A Fir tree 10 in. in diam. bears South 52°19' West 15.8 feet dist. scribed S21BT with B.T. tag and nail in base of tree.
A Fir tree 8 in. in diam. bears South 27°45' East 19.9 feet dist. scribed S22BT with B.T. tag and nail in base of tree.

Date of work 1977 to 198 Mag.Decl. 21 East

SURVEYOR'S CERTIFICATE

The fieldwork was performed and corner record prepared by me or under my direction in conformance with the Corner Perpetuation Act.

Name Gale R. Dahlman
R.L.S. No. 772
Employer Idaho Trans. Dept.

Seal, Signature, Date:

Marks on Monume

IDAHO STATE HIG
T 53N R 4 W
16 | 15
21 | 22
1977
LS 772
SURVEY MARK

Brass disk 3½ inc

For County Use Only

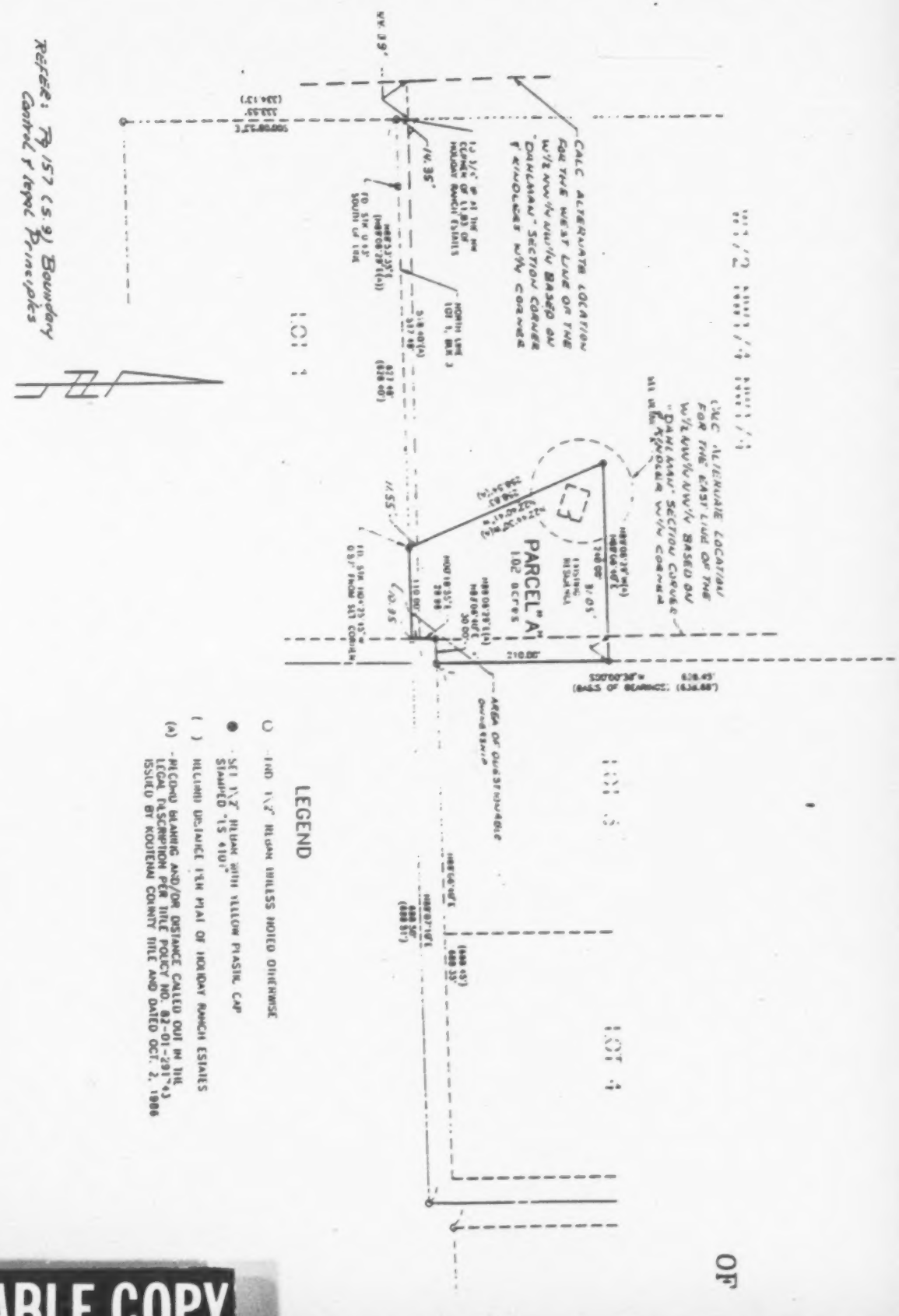
STATE OF IDAHO
County of Kootenai JUL 5 1984
Filed
At 8:03 o'clock A. M.
CAROL EBERLE
County Recorder
By

DIAGRAM

71

COUNTY Koote
SECTION 15,16,2
(Refer to diag

Appendix B


REFER TO: RS 157 (S.S.) Boundary Control & Legal Principles
CALC ALTERNATE LOCATION FOR THE WEST LINE OF THE W½ NW¼ NW¼ BASED ON "DAHLMAN" SECTION CORNER & WINDOLEAK N¼ CORNER
CALC ALTERNATE LOCATION FOR THE EAST LINE OF THE W½ NW¼ NW¼ BASED ON "DAHLMAN" SECTION CORNER & WINDOLEAK N¼ CORNER
PARCEL "A"
102 ACRES
LEGEND
FND 1½" REBAR UNLESS NOTED OTHERWISE
SET 1½" REBAR WITH YELLOW PLASTIC CAP STAMPED "LS 4107"
( ) RECORD BEARING AND/OR DISTANCE PER PLAT OF HOLIDAY RANCH ESTATES
(A) - RECORD BEARING AND/OR DISTANCE CALLED OUT IN THE LEGAL DESCRIPTION PER TITLE POLICY NO. 82-01-291-J ISSUED BY KOOTENAI COUNTY TITLE AND DATED OCT. 2, 1986

BEST AVAILABLE COPY